Supreme Court, U.S.
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JUL 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-41

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

HELEN T. MONAGLE, Petitioner

against

Anthony M. Frank, Postmaster General of the United States, Respondent

Supplemental appendix on Writ of Certiorari To The United States Court of Appeals For The First Circuit

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SUPPLEMENTAL APPENDIX - PETITION FOR WRIT OF CERTIORARI

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# SUPPLEMENTAL APPENDIX

Written Opinion issued by David S. Nelson United States District Court Judge, U. S. District Court for the District of Massachusetts, May 31, 1988.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

HELEN T. MONAGLE,

Plaintiff,

v. CIVIL ACTION

Preston R. Tisch, NO. 80-2635-N

Defendant.

NELSON, D.J. MAY 31, 1988

OPINION

Introduction.

Plaintiff brings this action for legal and equitable relief, alleging sex discrimination by the defendant in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16(e) (hereinafter Title VII) and age discrimination contrary to the provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §633a(hereinafter ADEA). A trial having been conducted, it is left to this Court to make findings of fact and rulings of law.

1. Findings of Fact.

1. Plaintiff was born on September 6, 1923. (Exhibit 1, p. 39.)

2. Plaintiff began employment with the Postal Service as a clerk-stenographer in 1967; she was later transferred to the safety section in the same position in 1976. (Id.)

3. Plaintiff has a high-school education, having graduated from high school in 1941. She has obtained no additional educational degree. (Id.)

4. Postmaster Philip L. Sullivan promoted plaintiff to the position of Safety Technician, EAS-11, in 1978. (Id.)

5. The postal service posted the position of Safety Specialist (00184-5004) on March 24, 1980 and advertised it under Vacancy Announcement NC-80-20. (Exhibit 1, p. 46).

6. Eleven persons applied for this position in addition to the plaintiff. They were both male and female. (Exhibit 1, P.70).

7. Winifred M. Henderson, Francis T. Dunford, and the plaintiff were placed on the

"most qualified" list for the position after the initial evaluation process, which included interviews. These persons were placed on the list by the review committee on May 6, 1970. (Testimony of James Leahy, Tr. 2-158 161-62; Exhibit 1, p. 12.)

8. Out of four persons interviewed for the position, one was not selected to make the list of most qualified candidates. He was Robert Messenger. (Testimony of Leahy, Tr. 2-148-49; Philip Sullivan, Tr. 2-4; and Ramon Bladuell, Tr. 2-97-98; Exhibit 1, P. 13).

9. The candidates on the final "most qualified" list were Postal Service Employees from within the area of consideration for the job vacancy. (Testimony of Sullivan, Tr. 1-115-16, 136, 143; Exhibit 1, pp. 14, 26, and 39; Defendant's Exhibit 2, p. 6, n.2.)

10. The selection process the three applicants faced involved review of the applicant's Form 991s' their applications, evaluations by their supervisors, and the candidates'

responses during interviews. (Testimony of Bladuell, Tr. 2-77; Leahy, Tr. 2-153-54, 158-59, 161, and 163; and Sullivan, Tr. 2-14-15.

11. In May, 1980, the official responsible for final selection of the candidate to fill the Safety Specialist position was Postmaster Philip L. Sullivan. (Testimony of Sullivan, Tr. 1-105,111; Tr. 2-5.)

12. Sullivan received a recommendation on May 12, 1980 from Ramon E. Bladuell, Acting Director of Employee and Labor Relations (hereinafter E & LR) and functional director responsible for the Safety Section, advising him that Dunford was the best choice for the vacant position. Bladuell made this recommendation on the basis of Dunford"s "education and experience shown." (Testimony of Bladuell, Tr. 2-59, 77, 98; and, Sullivan, Tr. 1-129, Tr. 2-5, 6; Exhibit 1, P. 10.)

13. During these events, the Boston Management Sectional Center (Hereinafter MSC) was a highly mechanized facility for processing mail. (Testimony of Bladuell, 2-119-20;.

Sullivan, Tr. 2-7.)

14. Dunford's birthdate is May 24, 1932, making him almost 48 years old in this period. (Exhibit 1, p. 14).

15. Applicant Dunford had worked in two major corporations, specializing in manufacturing and product engineering. He had contact with machinery on the job; he had also been a security police supervisor in an EAS-14 position. His educational experience was also relevant to the postion: he received a B.A. from the University of Massachusetts in Management and he received an A.S. degree from Boston University in Engineering. (Testimony of Sullivan, Tr. 2-9, 10, 14; Exhibit 1, pp.14-24.)

16. He also had specialized safety experience: he was a First Aid Instructor for the American Red Cross, a CPR Instructor for the American Heart Association, and a certified motor vehicle Accident Investigator. (Testimony of Sullivan, Tr. 2-10-13: Exhibit 1, pp. 14-24.)

17. The candidate Dunford was also a veteran. (Id.)

18. Dunford received an excellent recommendation without qualification from his supervisor urging his selection for the Safety Specialist position. (Testimony of Sullivan, Tr. 2-13; (Exhibit 1, pp. 14-24.)

20. Sullivan selected Dunford for the supervisory re-assignment to the position of Safety Specialist (A), EAS-14, because he believed Dunford was the best qualified person for the position. (Testimony of Sullivan Tr. 1-106-07; Tr. 2-9-1-.)

21. Sullivan made his decision on the basis of Dunford's experience as a Security Police Supervisor and his engineering background. He thought that these experiences made him better qualified than his competitors for the position. (Testimony of Sullivan Tr. 2-9-10, 14, 52, 53.)

22. The funcional director above the safety section, Bladuell, also based his determination and recommendation regarding Dunford's qualifications on these same factors. (Testimony of Bladuell, Tr. 2-119-20.)

23. Sullivan believed, in good faith, that Dunford was a better qualified candidate for the Safety Specialist (A) EAS-14 position than the other two "most qualified" applicants. (Testimony of Sullivan, Tr. 1-106, Tr. 2-9-10, 14-15.)

24. Sullivan did not make his decision on the basis of the sex or age of any of the candidates. There is no credible basis to conclude otherwise. (Testimony of Sullivan, Tr. 2-14-15.)

25. No Postal Service procedures were violated during the May, 1980, selection process. (Testimony of Leahy, Tr. 2-163; Katherine Shanahan, Tr. 2-138; and Sullivan, Tr. 2-55; Exhibit 1, P. 11.)

II Rulings of Law

A. Sex Discrimination

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16(e) prohibits all discrimination in federal employment based on sex, U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983), citing

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981). The central issue in a discrimination suit involves the question of whether or not the plaintiff has proved intentional discrimination by a preponderance of the evidence. White v. Vathally, 732 F.2d 1037, 1040 (1st Cir. 1984).

2. This is the central focus of the case. Johnson v. Allyn & Bacon, Inc., 731 F.2d, 64, 69 (1st Cir. 1984); Hooker v. Tufts University 581 F. Supp. 104, 106 (D.Ma. 1983). This may often be proved by adoption of a "but for" causation test: that is, save for the discrimination of the employer, the applicant would have been hired. Loeb v. Textron, Inc., 600 F. 2d 1003, 1019 (1st Cir. 1979).

3. The plaintiff bears the ultimate burden of proving her case. Burdine, 450 U.S. at 230; Sweeney v. Board of Trustees of Keene State, 604 F 2d 106 (1st Cir. 1979).

4. The Supreme Court provides the courts with a three-step procedure for allocating burdens of production of evidence in a Title VI

case. U. S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); White v. Vathally, 732 F.2d 1037 (1st Cir. 1984); Johnson v. Allyn & Bacon, Inc. 731 F.2d 64(1st Cir. 1984).

5. The plaintiff's task begins with her initial burden producing evidence of a prima facie case of discrimination by a preponderance of the evidence. Burdine, 450 U.S. at 252-53. As the Supreme Court stated:

> The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.

Id. at 253.

6. A plaintiff's prima facie case will normally involve three elements. They require:

(i) proving that plaintiff belongs to a protected group;

(ii) proving that the plaintiff applied

for and was qualified for the promotion; and

(iii) proving that the plaintiff was rejected under circumstances which give rise to an inference of unlawful discrimination.

McDonnell Douglas, Supra at 802.

7. Proof of a prima facie case shifts the burden of persuasion to the defendant, who then shoulders the burden of proving a gender-neutral reason for his employment action. U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); White v. Vathally, 732 F2d 1037 (1st Cir. 1984; Johnson v. Allyn & Bacon, Inc., 731 F2d. 64 (1st Cir. 1984). To accomplish this the defendant must present facts allowing the trier of fact to rationally conclude that the employment decision had not been motivated by discriminatory intent. Burdine, 450 U.S. at 254-55.

8. The employment of a person because of superior qualifications to the plaintiff constitutes a genuine basis for selection and, unless discredited, defeats a claim of discrimination. Holder v. Old Ben Coal Company, 618 F.2d 1198, 1201 (7th Cir. 1980); Parker v. The Board of School Commissioners. 558 F. Supp. 680, 682 (S.D. Ind. 1983).

9. This court finds that the defendant met his burden of persuasion and rebutted the plaintiff's prima facie case at trial by his production of evidence showing that legitimate, gender-neutral factors motivated the Postmaster's decision not to promote the plaintiff to the position of safety specialist. The testimony of both Sullivan and Blaudell, was not effectively challenged by plaintiff. Both testified that while plaintiff was qualified, the winning candidate was better qualified because of his work performance experience, and education.

10. First, the winning candidate, Francis T. Dunford, was already an EAS-14 who

had served as supervisor of the Security Police Officers. Thus, he already had supervisory experience. Plaintiff was only an EAS-11 with little, if any, supervisory experience.

11. Dunford also had specialized safety experience as a certified motor vehicle accident investigator, and also had training in first aid and cardiopulmonary resuscitation. Plaintiff has no record of any of these skills.

12. Finally, Dunford had specialized educational training related to the job of Safety Specialist; he had an engineering degree in business management, an asset in a supervisory job. Plaintiff, on the other hand, did not have this specialized training.

13. Having found that the defendant has set forth legally sufficient evidence for the plaintiff's rejection, the presumption raised by the plaintiff's prima facie case has been rebutted, and this court looks to plaintiff for a showing by a preponderance of the evidence that the proffered reason is in fact

a pretext, Burdine, 450 U.S. at 255-56; Johnson v. Allyn & Bacon Inc., 731 F.2d 64, 71 (1st Cir. 5 1984).

14. Plaintiff must demonstrate how her qualifications exceeded those of Dunford in order toprove that those reasons are a pretext.

15. To meet this burden, plaintiff must persuade the court that either a discriminatory motive more likely than not motivated the employer, or that the employer's stated explanation is unworthy of credence. That is, this must decide which party's explanation of the employer's motivation it believes. U.S. v. Postal Service Bd. of Governors v. Aiken, 460 U.S. 711, 716 (1982), citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); Dea v. Look, 810 F.2d 12, 15 (1st Cir. 1987); White v. Vathally, 732 F.2d 1027, 1042 (1st Cir.1984).

16. Plaintiff produced neither evidence that a discriminatory animus motivated the Postal Service, nor any evidence to contradict

the reasons given for the defendant's decision

17. According to plaintiff, Sullivan and Blaudell paid no attention to the adverse impact of their actions, thereby violating applicable laws and regulations. She also indicates that the Postal Service erred by failing to develop better tests or evaluation designs. This theory, however, has no place in this case. As the First Circuit Court of Appeals has reiterated that in order to prove anindividual claim of discriminatory treatment, whether under the Constitution or under Title VII, a plaintiff must prove purposeful discrimination. White v. Vathally, 732 F.2d 1037, 1039 (1st Cir. 1984) citing Washington v. Davis, 426 U.S. 229, 239-41 (1976).

18. The plaintiff also argues that she was not appointed to an Upward Mobility Position in accordance with Federal Personnel Manual System Letter (hereinafter FPM Letter) 713-25. Plaintiff's Exhibit 3. She asserts that she did not receive the kind of training and development opportunities she claims she

was entitled to by virtue of that instruction. Id. She asserts that the voluminous material she refers to regarding postal regulations proves a systematic disregard by the Postal Service for its obligations under the Upward Mobility Program.

Unfortunately, plaintiff has not shown that this failure resulted in her rejection for the promotion. She has not shown the court that "but for" her skills training under the program, she would have been promoted. (Loeb v. Textron, Inc., 600 F.2d 1003, 1019 1st Cir. 1979); Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979).

19. Plaintiff cannot meet her burden of showing pretext merely by refuting or questioning the defendant's stated reason.

20. Qualifications for the successful candidate, plaintiff maintains, were improperly inflated by the Postal Service. According to plaintiff, the Postal Service substituted non-required for required experience. This, she says, violated various postal regulations.

Exhibit 1 p. 48.

21. A misjudgment by the employer of qualifications does not in itself lead to a finding of discrimination under Title VII. Burdine, 450 U.S. at 259.

22. Without specific evidence of intentional discrimination, statistical data is entitled to little weight in light of the small number of personnel in the Safety Section. Meehan v. New England School of Law, 522 F. Supp. at 499.

23. Plaintiff has submitted extensive evidence that she says indicates defendant has violated its own regulations and procedures. This court finds that this claim has been refuted by witness testimony. Testimony of Leahy, Tr. 2-163; Katherine Shanahan, Tr. 2-138 and Sullivan, Tr. 2-55; Exhibit 1, p. 11.)

24. Assuming arguendo that the plaintiff's claim is accurate, the procedures allegedly violated do not support a finding of unlawful discrimination. Meehan v. New England School of Law, 522 F. Supp. 484, 198 (D.Ma. 1981); Johnson v. Lehman, 679 F 2d 918, 922 (D.C. Cir.

1982). She has not shown the necessary discriminatory intent behind the violations. Id.; Page v. Bolger, 645 F.2d 227, 232-34 (4th Cir. 1980).

25. Plaintiff has not overcome her burden in this case. She has not offered any evidence that defendant's reasons for selecting Dunford over her were in fact a pretext for sex discrimination. Having failed to show this, she has also failed to show that her qualifications were actually superior to those of Mr. Dunford. She has not rebutted the testimony of Messrs. Sullivan and Bladuell that Dunford was chosen for non-discriminatory reasons. She does not explain why Sullivan would post the position for competitive bidding in order to indirectly; by passing her solely because of her sex.

B. Age Discrimination.

1. The Age Discrimination in Employment Act, specifically section 15, 29 U.S.C. §633a, prohibits age discrimination in federal employ-

ment. Lehman, Secretary of theNavy v. Nakshian, 453 U.S. 156 (1981).

2. The federal courts employ the same procedures in determination of whether or not age discrimination exists as they do in determination of whether the employer has discriminated in violation of Title VII. Loeb v. Textron, Inc., 600 F.2d 1003, 1015 (1st Cir. 1979) see Section II A. 1991 1-8, supra.

3. The question before the court is not whether or not the subjective business decisions of the employer are correct or represent good judgment. Rather, the question is simply whether the reasons for the decision as articulated by the employer are merely a pret ext for age discrimination. Loeb 600 F.2d at 1012, n. 6.

4. If the person promoted in place of the plaintiff is himself a member of the protected class and is only slightly younger than the plaintiff--the situation presented here--it is more difficult for the plaintiff to prove her case of age discrimination. Pace .

v. Southern Railway System. 701 F.2d 1383, 1390 - (11th Cir. 1983); see 29 U.S.C. §631.

5. Accordingly, the plaintiff bears the final burden of persuasion in this case; she must prove that the defendant intentionally discriminated against her on the basis of her age. Loeb, 600 F.2d at 1011-12. Plaintiff has offered no evidence to the effect that there was intentional discrimination based on her age; the defendant has offered uncontroverted testimony by Messrs. Sullivan, Bladuell, and Leahy that there was no intent.

C. Reprisal.

1. Title 29 of the Code of Federal Regulations, section 1613.261 protects a plaintiff from reprisal at any state in the presentation and processing of a complaint. 29 C.F.R. §1613.261 (1982).

2. This does not exempt a plaintiff from the requirement that she exhaust her administrative remedies by filing a charge of reprisal with an appropriate agency official before

a civil action is initiated on the basis of claimed reprisal. 29 C.F.R. §1613.262(a).

3. Under the regulations governing complaints of reprisal, a claimant must lodge her complaint with the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, an Equal Employment Opportunity A Federal Women's Program Coordinator, and such other officers as the agency may designate for that purpose. 29 C.F.R. §1613.214(a)(2).

4. Plaintiff has not submitted evidence that she filed her complaint with an appropriate official. Instead, a complaint was filed with Katherine Shanahan, who was not an official for purposes of receiving complaint of reprisal. No evidence has been presented to this court that Shanahan was the proper official. Thus, plaintiff has not exhausted her administrative remedies.

5. Plaintiff's rights were not abrogated by the denial of official time for taking of a deposition in connection with a civil law-

suit or for preparation for an EEO hearing. Plaintiff is only entitled to a reasonable amount of time to present her complaint. 29 C.F.R. §1613.214(b) (until November 20, 1987, 52 F.R. 41920, 41923 was in effect).

II. Postscript.

The court understands that the plaintiff bore a heavy burden when she elected to proceed pro se. A discrimination case is never simple and is always serious. Consequently, this court has labored long and hard to one, insure that plaintiff's allegatons have been heard, and two, to facilitate, whenever possible, a settlement acceptable to all parties. Plaintiff insisted that only a full trial of her claims would satisfy her demands. This was her right, and the court responded accordingly. But with plaintiff's decision came an obligation to abide by the Federal Rules of Civil Procedure and Evidence. While the court believes it has given the plaintiff the benefit of the doubt, it cannot in any way say that plaintiff has met her burden:

demonstrating the present of intentional age or sex discrimination and the proper exhaustion of remedies in prosecuting her allegations of reprisal.

ORDER

Judgment for the defendant shall, in accordance with these Findings and rulings, enter on the discrimination and reprisal counts.

SO ORDERED.

Signed:
David S. Nelson
United States District
Court Judge